

1 DANIEL PETROCELLI (S.B. #97802)
dpetrocelli@omm.com
2 JEFFREY A. BARKER (S.B. #166327)
jbarker@omm.com
3 DAVID MARROSO (S.B. #211655)
dmarroso@omm.com
4 O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 7th Floor
5 Los Angeles, California 90067-6035
Telephone: (310) 553-6700
6 Facsimile: (310) 246-6779

7 Attorneys for Defendants Top Rank, Inc.,
8 Robert Arum, Todd duBoef, Emmanuel
Pacquiao, and Michael Koncz

9 | (Continued on Next Page)

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

14 IN RE: PACQUIAO-MAYWEATHER
15 BOXING MATCH PAY-PER-VIEW
LITIGATION

MDL No. 2:15-ml-02639-RGK
(PLAx)

18 | This document relates to:

Case No. 2:15-cv-06226-RGK
(PLAx)

19 TERRENCE JACKSON, on behalf of
himself And all others similarly situated,

JOINT PRE-STATUS CONFERENCE REPORT

20 Plaintiff

Date: November 3, 2015
Time: 10:00 a.m.
Courtroom: 850
Judge: Hon. R. Gary Klausner

EMMANUEL PACQUIAO; TOP RANK, INC.; MICHAEL KONCZ; ROBERT ARUM; TODD DUBOEF; DOES 1-10 and ABC CORPS 1-10,

Defendants.

1 *(Continued from Previous Page)*

2 THE BERMAN LAW GROUP
3 ZACHARY WEST, ESQ.
4 Fla. Bar. No. 71134
5 P.O. Box 272789
6 Boca Raton, FL 33427
7 Telephone: (561) 826-5200
8 Fax: (561) 826-5201

9
10 Attorneys for Plaintiff Terrence Jackson

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Plaintiff Terrence Jackson (“Plaintiff”) and defendants Top Rank, Inc.,
 2 Robert Arum, Todd duBoef, Emmanuel Pacquiao, and Michael Koncz (collectively,
 3 “Defendants,” and with Plaintiffs, the “Parties”), through their undersigned counsel,
 4 respectfully submit this Joint Pre-Status Conference Report.

5 **I. CURRENT STATUS OF THIS CASE**

6 Plaintiff, a Florida resident, filed this action May 6, 2015 in the U.S. District
 7 Court for the Northern District of Florida. Plaintiff’s lawsuit is one of 43 putative
 8 class actions (the “Actions”) in this MDL that assert claims relating to a boxing
 9 match between Manny Pacquiao and Floyd Mayweather that took place on May 2,
 10 2015 in Las Vegas, Nevada (the “Match”). On August 14, 2015, this case was
 11 transferred as part of this MDL. *See In re: Pacquiao-Mayweather Boxing Match*
 12 *Pay-Per-View Litig.*, MDL No. 2639 (J.P.M.L.), Dkt. #149.

13 Activity in this action has been limited to Defendants requesting—and the
 14 transferor court granting—a suspension of their deadlines to respond to Plaintiff’s
 15 complaint to 45 days after a consolidated complaint is filed (or lead plaintiff’s
 16 counsel announces by filed notice that none will be filed). [Jackson Dkt. #13, 15.]
 17 No significant motion or discovery practice has occurred. Since transfer to this
 18 Court, this case (like all of the Actions) has been stayed. Thus, Defendants have
 19 yet to respond to Plaintiff’s complaint.

20 **II. CLAIMS IN THIS CASE**

21 ***Plaintiffs’ Statement Regarding the MDL Cases.*** In this MDL, there are
 22 generally two types of cases: (1) **Consumer cases:** those filed on behalf of
 23 consumers who purchased the pay-per-view (“PPV”) broadcast directly (through
 24 their cable provider) or indirectly (by paying admission at a third-party
 25 establishment) for: (a) violations of state consumer protection and deceptive
 26 practices laws; (b) violations of state false advertising statutes; (c) unjust
 27 enrichment / money had and received; and (d) fraud or fraudulent concealment; and
 28 (2) **Commercial cases:** those filed on behalf of commercial establishments such as

bars and restaurants that purchased commercial PPV licenses and then charged patrons cover-charges or dues to enter and watch for: (a) violations of the federal Lanham Act, 15 U.S.C. §1125 *et seq.*; (b) violations of state unfair competition laws; (c) violations of state false advertising statutes; and (d) unjust enrichment / money had and received. In addition, certain cases assert claims on behalf of live attendees and individuals who placed wagers on the fight. Plaintiffs in both Consumer and Commercial cases seek damages, restitution and other relief.

All cases in this MDL name Pacquiao (Boxer) and Top Rank, Inc. (Promoter) as common Defendants. A number of cases also assert claims against Top Rank officers Bob Arum, Michael Koncz and Todd duBoef, as well as broadcasters and producers HBO, and Showtime, plus Mr. Mayweather (Pacquiao's opponent) and Mayweather Promotions LLC.

Joint Statement Regarding the Jackson Action. Plaintiff asserts on behalf of himself and putative class members four claims against Defendants for alleged fraudulent concealment; violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUPTA"), Fla. Stat. § 501.201, *et seq.*; "conspiracy to conceal defendant Pacquiao's injuries and commit deceptive trade practices" in violation of common law and FDUPTA; and unjust enrichment. Compl. ¶¶ 26-46. Plaintiff alleges that people who paid to watch the Match and placed wagers on the Match are entitled to compensation and other relief because, according to his Complaint, after Pacquiao injured his shoulder during training for the Match, Defendants were required to (but allegedly did not) disclose the nature and extent of his injury to the public in advance of the Match. *See, e.g., id.* ¶¶ 2-4, 19, 27-29. Plaintiff also alleges that Defendants made certain affirmative misrepresentations about the Match. *See, e.g., id.* ¶¶ 4-6, 19.

III. COMPOSITION OF CLASS IN THIS CASE AND SUGGESTIONS FOR CONSOLIDATION OF CLASSES

Plaintiff seeks certification of a class that "consists of all persons who paid

1 for tickets to the Event[,] purchased pay per view showings or made wagers on the
 2 Event, which did not know that Defendant Pacquiao had been seriously injured
 3 prior to the Event and that the Defendant did not disclose such information to the
 4 general public or even to the Nevada Athletic Commission.” *Id.* ¶ 19.

5 The Parties agree and recommend that this case and all others transferred
 6 already or in the future should be consolidated for pretrial purposes in this
 7 proceeding, and that this matter should be included in a consolidated complaint
 8 with the other Actions. The Parties agree that the plaintiffs in the MDL Proceeding
 9 may consolidate overlapping putative classes in their consolidated complaint,
 10 without prejudice to Defendants’ right to oppose certification of such putative
 11 classes under Rule 23. It is anticipated that a Consolidated Amended Complaint
 12 would likely be filed on behalf of each type of case (*i.e.*, depending on the class and
 13 claims asserted) once a leadership structure is appointed by the Court to oversee
 14 and manage that task. It is common in a consumer protection case such as this for
 15 claims to be generally consolidated for pre-trial purposes, and not merely
 16 coordinated, with a single leadership structure being appointed to manage the case.
 17 *See, e.g., In re Toyota Unintended Acceleration Mktg., Sales & Prods. Liab. Litig.*,
 18 754 F. Supp. 2d 1145 (C.D. Cal. 2010).

19 **IV. ISSUES TO BE RESOLVED IN THIS CASE THAT WOULD
 20 PREVENT RESOLUTION OR SETTLEMENT**

21 ***Plaintiffs’ Statement.***¹ Plaintiffs believe many factual issues are not in
 22 dispute. The Match, billed to the public as the “Fight of the Century,” is now being
 23 referred to as the “Fraud of the Century” because Pacquiao did not disclose a severe
 24 shoulder injury that occurred shortly before the Match as he was required to do
 25 under the relevant boxing regulations. Thus, unbeknownst to the public, Pacquiao

26
 27 ¹ Collective proposals for case management, including the proposed schedule, have
 28 been jointly submitted and approved by plaintiffs in 32 of the Actions and were
 facilitated by the Zimmerman Reed and Kaplan Fox & Kilsheimer firms.

1 entered the Match badly injured and was unable to fully and fairly compete against
 2 his chief rival. Plaintiffs allege that prior to the start of the Match, all Defendants
 3 were aware that Pacquiao had suffered a torn rotator cuff and that the injury would
 4 critically hinder his performance. However, Plaintiffs allege they intentionally
 5 concealed that fact from the public in order to continue selling expensive PPV
 6 packages and avoid providing refunds or canceling the Fight.

7 Among other things, Plaintiffs allege that Pacquiao unlawfully deceived
 8 boxing regulators in a Nevada State Athletic Commission Pre-Fight Medical
 9 Questionnaire under penalty of perjury by checking “no” when answering questions
 10 asking if he had suffered a shoulder injury or had any serious medical illnesses or
 11 conditions that would impede his ability to fairly compete under Nevada’s boxing
 12 laws. Numerous observers also criticized Pacquiao’s performance during the Fight
 13 as hampered by injury and clearly less than 100% of the former world champion’s
 14 capabilities. After the Fight, Pacquiao publicly admitted his shoulder was
 15 functioning at 60% and told reporters it was “hard to fight one-handed” but that “I
 16 didn’t want to disappoint the fans so we decided to continue the fight.” On May 5,
 17 2015, Pacquiao and Top Rank issued a press release revealing, *inter alia*, that:
 18 “During training, Manny Pacquiao suffered a right shoulder injury.... Manny
 19 continued to train and his shoulder improved, though not 100%....His shoulder
 20 wasn’t perfect but it had improved in training camp.”

21 By failing to disclose that Pacquiao was injured prior to the Match while still
 22 promoting, advertising and selling the Fight to Plaintiffs and the Class (for about
 23 \$100 each) as a fair and honest sporting event between two healthy participants,
 24 Defendants deceived Plaintiffs and putative class members, who were unlawfully
 25 deprived of what they paid for and therefore damaged financially.

26 Plaintiffs are cognizant that resolution of dispositive motions may narrow the
 27 legal issues in this case and facilitate settlement discussions, but decline to respond
 28 to Defendants’ specific legal arguments set forth below at this time because they are

1 premature for purposes of addressing case management. Plaintiffs disagree with
 2 Defendants' positions and look forward to addressing them through motion practice
 3 once initial case management issues are settled. However, if Defendants intend to
 4 invoke any purported arbitration agreements and compel arbitration they should be
 5 required to do so immediately in order to save the Parties' and the Court's
 6 resources. Plaintiffs believe any further delay or failure to demand arbitration
 7 constitutes waiver.

8 ***Defendants' Statement.***² Although the putative class definitions and claims
 9 being asserted differ among the Actions, Defendants anticipate asserting several
 10 factual and legal defenses to Plaintiff's claims, including the following legal
 11 defenses which may dispose of this case (and other Actions) at the pleading stage.³

12 **1. Failure to State a Viable Claim for Relief**

13 No Extraterritorial Reach of State Law. Many states (like Florida) limit the
 14 geographical scope of their consumer protection laws. *See Five for Entm't S.A. v.*
 15 *Rodriguez*, 877 F. Supp. 2d 1321, 1330-31 (S.D. Fla. 2012). Since no conduct is
 16 alleged to have occurred in Florida, there is no FDUPTA claim.

17 No Cognizable Injury. Individuals who paid to watch the Match had, at most,
 18 a license to view the Match—and that is exactly what they got. Courts have
 19 rejected claims by disgruntled viewers of sporting events, like Plaintiff, who alleged
 20 they were entitled to more. *See, e.g., Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir.
 21 2010); *Castillo v. Tyson*, 701 N.Y.S.2d 423, 425 (App. Div. 2000).

22 No Duty to Disclose. Plaintiff's claims are based on a "duty" that does not
 23 exist: that Defendants had to disclose intimate details about Pacquiao's health to the

25 ² Defendants dispute the veracity of the allegations in Plaintiff's Statement(s).

26 ³ This is not an exhaustive list. Given the potentially differing posture of certain
 27 Defendants, some Defendants may be dismissed from the case at different points
 28 for different reasons. Also, should any claims survive these pleading challenges,
 Defendants will challenge class certification on a number of grounds.

1 public.⁴ No court has recognized such a duty, as prospective viewers of any sport
 2 do not and cannot reasonably expect to see a contest between unblemished fighters
 3 or be provided with a pre-fight injury report. *Cf. Bowers v. Fédération*
 4 *Internationale de l'Automobile*, 489 F.3d 316, 324 (7th Cir. 2007).

5 No Cognizable Claims for Gambling Class. The gambling class claims in
 6 this case are also barred because no cognizable privity exists between plaintiffs and
 7 defendants; state and federal law forbids wagering on the outcome of a sporting
 8 event; state law precludes claims based on wagering conduct; and a failure to
 9 exhaust administrative remedies. *See, e.g., Kelly v. First Astri Corp.*, 72 Cal. App.
 10 4th 462, 466 (1999).

11 No Actionable Misrepresentations. Plaintiff fails to state a plausible claim
 12 for relief based on the purported misrepresentations at issue, as he fails to allege
 13 that he was even exposed to those misrepresentations prior to his PPV purchase.
 14 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

15 No Specific Facts as to Many Defendants. The complaint suffers from fatal
 16 pleading defects, including improper group pleading and failing to specifically
 17 identify alleged misrepresentations made by certain Defendants. *See Blair v.*
 18 *Wachovia Mortgage Corp.*, No. 5:11-CV-566-OC-37TBS, 2012 WL 868878, at *4
 19 (M.D. Fla. Mar. 14, 2012). Because Plaintiffs' claims sound in fraud, *see, e.g.,*
 20 Compl. ¶¶ 26-39, they are subject to dismissal under Rule 9(b). *See Kearns v. Ford*
 21 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).

22 **2. Arbitration Barring Participation in Class Action Lawsuits**

23 Some or all of Plaintiff's individual and putative class claims on behalf of
 24 PPV purchasers are subject to arbitration. PPV purchasers entered into terms of
 25 service agreements with their cable or satellite providers, many of which include
 26

27 ⁴ This wrongly assumes all Defendants had identical knowledge and identical duties
 28 with respect to Pacquiao's health.

1 arbitration provisions expressly barring class actions.⁵ Even the non-signatory
 2 *Jackson* Defendants are entitled to enforce such provisions in these circumstances.
 3 See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631-32 (2009).

4 **3. Lack of Personal Jurisdiction**

5 MDL courts “appl[y] the law of the transferor forum to determine personal
 6 jurisdiction.” *In re: Hydroxycut Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d
 7 1100, 1106 (S.D. Cal. 2011). No Defendant is domiciled in Florida, *see Compl.*
 8 ¶¶ 12-16, and Plaintiff otherwise fails to specify how any Defendant has sufficient
 9 contacts with Florida for personal jurisdiction.

10 **V. THE PARTIES’ PROPOSAL FOR HANDLING AND
 11 ADMINISTERING THIS MDL PROCEEDING**

12 **A. Filing of Consolidated Complaint**

13 For the reasons set forth above, the Parties recommend and request that the
 14 Court order plaintiffs in this MDL to file one or more consolidated complaints
 15 depending on the class and claims asserted.

16 **B. Scheduling Issues and Resolution of Defendants’ Motion(s) to
 17 Dismiss and Other Case-Dispositive Challenges**

18 The Parties’ proposed schedule is attached hereto as Exhibit A.

19 **C. Stay of Discovery**

20 **Plaintiffs’ Statement.** Plaintiffs believe discovery should commence seven
 21 days after appointment of lead counsel and do not believe there is any legal
 22 authority mandating a stay of discovery in a consumer protection MDL such as this,
 23 even when motions to dismiss are contemplated. Discovery has already been
 24 stayed for many months pending the MDL and any further delays will only
 25 prejudice Plaintiffs further, particularly given the tight deadlines for filing for class
 26 certification. Consolidation of the actions with discovery overseen by Plaintiffs’

27 ⁵ See, e.g., Verizon Agreement ¶¶ 2, 17(a), (c), at http://www.verizon.com/idc/groups/public/documents/adacct/fios_tv_tos_08211.pdf (last visited Oct. 9, 2015).

1 lead counsel will also obviate Defendants' concerns about duplication. Defendants'
2 vague proposals about staying all discovery while phasing motions to dismiss and
3 motions to compel arbitration that may only apply to a small portion of Plaintiffs
4 and causes of action in the MDL prejudice all Plaintiffs and will only cause
5 significant delay in resolving this litigation. Plaintiffs also believe Defendants
6 should immediately produce any core documents that Defendants may easily
7 assemble prior to the commencement of formal discovery, such as documents
8 already produced to a regulatory agency as part of its investigation into the
9 allegations raised in this case. Such an initial production may help target discovery
10 by identifying potential deponents, document custodians and search terms, and may
11 facilitate settlement discussions. Plaintiffs will oppose any formal motions to stay.

12 **Defendants' Statement.** Defendants ask that all discovery be stayed until the
13 Court rules on Defendants' motion(s) to dismiss and/or motion(s) to compel
14 arbitration. A stay is appropriate and will minimize expense to all concerned
15 because any discovery is premature and unnecessary until the issues raised in these
16 motion(s) are resolved. Moreover, failure to stay discovery would lead to
17 duplicative discovery, substantial coordination issues as the parties have to address
18 43 separate cases, prejudice to those Defendants with few-to-no allegations against
19 them who might be dismissed early on, and other inefficiencies which would
20 impose a costly burden on Defendants, plaintiffs and the Court. Courts have broad
21 discretion to stay—and routinely do stay—discovery while a motion to dismiss or
22 motion to compel arbitration is pending. *See, e.g., In re Graphics Processing Units*
23 *Antitrust Litig.*, No. C 06-07417 WHA, 2007 WL 2127577, at *2 (N.D. Cal. July
24, 2007); *Steiner v. Apple Computer, Inc.*, No. C 07-4486 SBA, 2007 WL
25 4219388, at *1 (N.D. Cal. Nov. 29, 2007). After all, Rule 8 “does not unlock the
26 doors of discovery for a plaintiff armed with nothing more than conclusions.”

27
28

1 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).⁶

2 **D. Appointment of Lead Counsel and Steering Committees**

3 ***Plaintiffs' Statement.*** Plaintiffs believe that a balance should be struck
 4 between having sufficient resources to litigate this case on the one hand, and on the
 5 other hand, doing so efficiently. Plaintiffs believe this can best be achieved with a
 6 structure on the Plaintiffs' side of the case with a 2-3 firms appointed as Co-Lead
 7 Counsel and/or a Liaison Counsel, and anticipate requesting that the Court appoint
 8 an Executive Committee of a few well qualified firms to assist with discrete tasks
 9 as assigned by Co-Lead Counsel. The role of Lead Counsel will be to oversee the
 10 litigation and make strategic decisions, assign necessary litigation tasks, interact
 11 with Defendants' counsel, handle court appearances and perform other general
 12 duties typically performed by lead counsel in multidistrict litigation cases. The role
 13 of an Executive Committee will be to help administer, supervise and perform
 14 specific litigation tasks at the direction of Lead Counsel. The role of the Liaison
 15 Counsel shall be to serve as the intermediary between the Plaintiff's leadership
 16 team, the Court, and the larger group of Plaintiffs' counsel. The specific duties and
 17 obligations of any leadership structure will be specified in a proposed order.

18 While some of Plaintiffs' counsel have conferred in an effort to obtain a
 19 consensus for the appointment of interim Co-Lead Counsel, should no agreement
 20 be reached prior to the November 3 hearing, Plaintiffs propose the shortened
 21 briefing schedule for lead counsel applications set forth in Exhibit A.

22 ***Defendants' Statement.*** Because O'Melveny & Myers LLP ("O'Melveny")
 23 represents all Defendants in this case, the Court need not appoint lead counsel or
 24 liaison counsel for this case. If the Court intends to appoint liaison counsel for
 25 defendants in this MDL to coordinate with, but not bind, other Defendants,

26
 27 ⁶ At a minimum, Defendants should be afforded an opportunity to brief the issue of
 28 a discovery stay. Defendants will discuss with Plaintiff if any discovery activities
 are warranted during the stay, such as the negotiation of a protective order.

Defendants request that the Court appoint Daniel Petrocelli and Jeffrey A. Barker of O'Melveny to serve in this position. Plaintiff does not object to this request.

E. Timing of Settlement Conferences and Class Certification Briefing

Plaintiff does not believe that there are any barriers which currently prevent her from beginning discussions with Defendants aimed at resolving or settling this case, so long as certain discovery took place in order to make those discussions meaningful and informed. However, Plaintiff is aware that Defendants may want to first engage in motion practice, including contested dispositive and class certification motion practice, before agreeing to participate in such discussions.

Defendants respectfully submit that settlement discussions and class certification briefing are premature.

VI. OTHER SIGNIFICANT ISSUES

A. Related Cases

One more related case in state court exists that is not currently pending before this Court: *Lake v. Top Rank, Inc., et al.*, Case No. 1522-CC10590 (Cir. Ct. St. Louis, Mo.). Defendants intend to remove the *Lake* action to federal court and file a request with the JPMI to have the action transferred to this Court.

Dated: October 9, 2015

Respectfully submitted,

DANIEL PETROCELLI
JEFFREY A. BARKER
DAVID MARROSO
O'MELVENY & MYERS LLP

By: /s/ Jeffrey A. Barker
Jeffrey A. Barker

*Attorneys for Defendants Top Rank, Inc.,
Robert Arum, Todd duBoef, Emmanuel
Pacquiao, and Michael Koncz*

1 ZACHARY WEST
2 THE BERMAN LAW GROUP
3
4

5 By: /s/ Zachary West
6 Zachary West
7
8

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for Plaintiff Terrence Jackson

ATTESTATION

I hereby attest that the other signatories listed, on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: October 9, 2015

O'MELVENY & MYERS LLP

By: /s/ Jeffrey A. Barker
Jeffrey A. Barker